IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No.

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HAROLD R. SMITH, Appellant

v.

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT, LUTHERAN SCHOOLS OF MICHIGAN, MISSOURI SYNOD, MICH. ASSN. OF NON-PUBLIC SCHOOLS, MICH. CATHOLIC CONFERENCE, MICH. FEDERATION OF CITIZENS FOR EDUCATIONAL FREEDOM, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, NATIONAL UNION OF CHRISTIAN SCHOOLS, MICHIGAN EDUCATION ASSOCIATION, FRANK J. KELLEY, ATTY GENERAL, AND ROBERT A. DERENGOSKY, SOLICITOR GENERAL, STATE OF MICH., Appellees.

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

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## JURISDICTIONAL STATEMENT

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Appellant appeals from the final judgment of the Supreme Court of Michigan entered on September 14, 1970 declaring constitutional a self executing statute which grants financial assistance to nonpublic religious schools, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinions of the Supreme Court of Michigan are reported in 384 Mich. 82 and 180 NW(2) 265. Copies of the opinions are appended, marked "A".

## JURISDICTION

By concurrent resolution of both houses of the legislature the Michigan Supreme Court was, pursuant to Sec. 8 of Art. 3 of the Michigan Constitution, requested to pass upon the constitutionality of amendatory Act 100, Public Acts, 1970. The Court granted the request, and by order of July 21, 1970 invited persons and groups interested to file briefs. Appellant applied, filed a brief and was recognized as a party in the Court's opinion. The final judgment entered September 14, 1970 declared that there was no conflict between the statute, Act 100, and the constitution of the United States. The notice of appeal to this Court was filed in the Supreme Court of Michigan on December 8, 1970. The jurisdiction of the Supreme Court of the United States to review the decision of the Supreme Court of Michigan by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2) and 2201. Decisions which sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal include: *Burton* v. *Wilmington*, 365 U.S. 715, review of declaratory judgment; *Dr. Cruso* v. *Robinson*, review of the decision by a three judge Federal Court in Rhode Island now docketed in this Court. The full text of Chapter 2 of amendatory Act 100, Public Acts, 1970, is appended, marked "B".

## QUESTIONS PRESENTED

The question presented by this appeal is whether amendatory Act 100, Public Acts, 1970, by appropriating funds annually for the support of nonpublic religious schools

contravenes and is repugnant to Articles I and XIV of the Constitution of the United States.

## STATEMENT

The case on appeal had its inception in the request of the legislature for a determination with respect to the constitutionality of amendatory Act 100, Public Acts, 1970 and its conclusion in the final judgment of the Supreme Court of Michigan declaring that there was no conflict between the statute "and the existing provisions of the State and Federal Constitutions." The federal questions sought to be reviewed were raised in the petition of appellant as a taxpayer and as a person interested in the determination. The petition is appended, marked "C". Parenthetically "Chapter 2 of Enrolled Senate Bill No. 1082" became Amendatory Act 100 P.A. 1970. The decision of the Supreme Court of Michigan "in favor" of the validity of the statute and rejecting appellant's contention that the statute was repugnant to the Constitution of the United States brings the case within Section 1257 (2) United States Code and is believed to confer jurisdiction on this Court.

## QUESTION IS SUBSTANTIAL

Amendatory Act 100 provides for annual appropriations of millions for the support of nonpublic religious schools. The statute is self executing. No further act on the part of the legislature is required to make the financial assistance available. No provision is made for further intervention by the courts of the state. The funds are immediately available under the statute. There could be no more substantial assist to the "establishment of religion". If the statute is permitted to remain operative, an annually recurring controversy over amounts to be allocated respectively to public and religious schools will have been

inaugurated. Such an unfortunate situation now exists in Ontario, Canada.

## MICHIGAN CONSTITUTIONAL AMENDMENT

The voters of the State of Michigan on Nov. 3, 1970 adopted an amendment to the Constitution of the State of Michigan by adding to Art. 8, Sec. 2 the following:

"Article 8, Section 2. No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

The necessity for this appeal might have been avoided if the foregoing amendment were permitted to remain in effect. However, a suit was commenced in the Grand Traverse Circuit Court which drew in question the validity of the proceedings for the adoption of the amendment, and the Supreme Court of Michigan has ordered the Circuit Court to certify that question to the Supreme Court for decision.

Thus Amendatory Act 100 P.A. 1970 remains active and effective and the controversy over state financial assistance to nonpublic religious schools is substantial and critical.

## JUDGMENT APPEALED FROM

A copy of the judgment of the Supreme Court of Michi-

gan from which this appeal is taken is appended, marked "D".

Appellant considers the questions presented by this appeal substantial and of public importance.

Respectfully submitted,

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## APPENDIX A

## STATE OF MICHIGAN
## SUPREME COURT

**IN THE MATTER OF THE LEGISLATURE'S REQUEST FOR AN OPINION ON THE CONSTITUTIONALITY OF CHAPTER 2 OF AMENDATORY ACT NO. 100 OF THE PUBLIC ACTS OF 1970 (ENROLLED SENATE BILL NO. 1082).**

**BEFORE THE ENTIRE BENCH**
**T. M. KAVANAGH, J.**

We were requested by the Legislature, pursuant to art 3, § 8, of the Michigan Constitution of 1963, to pass upon the constitutionality of chapter 2 of amendatory Act No. 100 of the Public Acts of 1970.[1]

This act of the Legislature comes before our Court clothed with the presumption of constitutionality, and we must scrupulously sustain the legislative will if within the constitutional limitations of its function. 1 Cooley, Constitutional Limitations, ch 4 (8th ed, 1927); *Evans Products Co.* v. *State Board of Escheats* (1943), 307 Mich. 506; *Beacon Club* v. *Kalamazoo County Sheriff* (1952), 332 Mich. 412; *Gartland Steamship Company* v. *Corporation & Securities Commission* (1954), 339 Mich. 661, and cases cited therein; *Munn* v. *Illinois* (1876), 94 US 113 (24 L Ed 77).

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[1] Commonly called the State School Aid Bill, signed by the Governor on July 29, 1970, and brought to our Court by House Concurrent Resolution No. 835. Reference hereinafter to the act shall be understood to designate chapter 2 thereof.

It is likewise incumbent upon our Court to give effect to the plain and clear intent of the Legislature irrespective of possible view of any Justice or Justices that such intent is unwise or impolitic. *C. F. Smith Co. v. Fitzgerald* (1935), 270 Mich 659, 671.

Turning to the specific provisions of the act, we note that it provides for the purchase by the Department of Education from eligible units[2] of educational services in secular subjects[3] at a cost of not to exceed 50 per cent of the salaries of lay teachers teaching secular subjects for the fiscal years 1970-71 and 1971-72 and 75 per cent of such salaries thereafter. The sum appropriated by the Legislature is limited to 2 per cent of the total expenditures from State and local sources for the support of the public primary and secondary

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[2] "'Eligible unit' means a board of education, association or corporation operating a nonpublic school or system of nonpublic schools, which is complying with all educational standards as required by law, has filed with the state department of education a certificate that it complies with section 2 of article 8 of the state constitution and title VI of the civil rights act of 1964 (Public Law 88-352) in effect on December 1, 1969, has applied on a form provided by the superintendent for aid provided by this chapter for the fiscal year 1970-71 by August 15, 1970 and for each succeeding fiscal year by October 1 prior to the beginning of the fiscal year for which such aid is sought and is certified by the superintendent as having substantially complied with all state laws concerning evaluation of pupils and other laws applicable to nonpublic schools. If an application is not made it shall be conclusive evidence that an eligible unit does not desire to participate in the provisions of this chapter for that year." [Sec 55, subd (*c*)]

[3] "'Secular subjects' means those courses of instruction commonly taught in the public schools of this state including but not limited to language skills, mathematics, science, geography, economics, history, as defined by the state department of education, which shall expressly not include any course of instruction in religious or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship. Textbooks used in such secular subjects shall meet the same criteria as required of textbooks used in the public schools." [Sec 55, subd (d)]

education system in the last preceding fiscal year.[4] The payments are restricted to certified lay teachers[5] teaching secular subjects from textbooks meeting the criteria required of textbooks used in public schools. The act expressly prohibits payment or reimbursement for services to any teacher who is "a member of a religious order * * * or who wears any distinctive habit, or both" [sec 55, subd (b)] or for "any course of instruction in religious or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship." [sec 55, subd (d)]

Participation under the act by nonpublic schools [eligible units] is wholly voluntary. To qualify, an eligible unit must file a timely application with the Superintendent of Public Instruction, furnish appropriate certification listing lay teachers, their salaries and their State certification

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[4] "The sum so appropriated shall not exceed 2% of the total expenditures from state and local sources for the support of the free public elementary and secondary public education system in this state in the last preceding fiscal year, as determined or estimated when necessary, by the superintendent from records available to him and financial accounting records of public school units maintained in accordance with rules promulgated by the state department of education. For the purpose of such limitation, total expenditures shall not include the amounts expended for bus transportation and auxiliary services for public and nonpublic school students. This appropriation shall not exceed $22,000,000.00 during the 1970-71 school year beginning July 1, 1970." (sec 58)

[5] "'Certified lay teacher' means a teacher who holds a valid certificate or permit issued by the state to teach in the public schools of this state and is not a member of a religious order, who by vow or promise has chosen the religious life of poverty as a vocation or who wears any distinctive habit, or both." [sec 55, subd (b)]

status,[6] provide a compliance certificate as to Title VI of the Federal Civil Rights Act of 1964[7] and the Michigan constitutional anti-discrimination clause,[8] and maintain an accounting system segregating allowances attributable to payment of the certified lay teachers teaching secular subjects.[9]

The intent of the Legislature in passing this law is clearly, plainly and unambiguously stated in section 56 of the act:

> "Sec. 56. The legislature finds that large numbers of children are being educated in nonpublic elementary and high schools in this state and further finds that increasing costs of education are impairing the

[6] "Prior to the first day of the quarter for which payments are due, an eligible unit shall certify to the superintendent on a form prepared by him, a list of certified lay teachers teaching secular subjects employed by such unit, the salaries and certification of each. Where the superintendent finds that a certified lay teacher is providing less than a full schedule of instruction in secular subjects, he shall allocate that part of the salary due such teacher for such instruction in secular subjects and shall prepare a voucher for payment to the eligible unit for the allocated portion of the salary of such teacher as provided in section 60. The superintendent shall prepare appropriate vouchers and the state treasurer shall pay to the eligible units the aggregate allowance for the salaries for the teachers employed by the unit." (sec 61)

[7] 42 USCA, § 2000d: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[8] "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." Mich Const 1963, art 8, § 2.

[9] "As an express condition of continued certification, the eligible units shall maintain such accounting systems as will enable the department at all times to ascertain that the allowances by the state were in fact used to pay the certified lay teachers teaching secular subjects and not for any other purpose." (sec 62)

> quality of secular education of children enrolled in nonpublic schools lawfully selected by their parents. These schools perform, in addition to their sectarian function, the task of secular education. The legislature declares as public policy of the state that the public good and general welfare require that state appropriations now provided to public school districts under this act for the purpose of furnishing opportunities for public school children to secure a quality secular education be extended to assist in providing opportunities for quality secular education to children attending nonpublic elementary and high schools, as part of a general program to foster and encourage knowledge so as to provide a mature citizenry capable of contributing to good government, and to the safety and the economic and civil well-being of all the people of this state."

The intent, being so clearly expressed, precludes resort to rules of construction and our sole function at this juncture is to determine whether such plain intent and concordant design is violative of constitutional principles, either Federal or State.

I. *The Free Exercise and Establishment Clauses of the First Amendment.*

The First Amendment to the Federal Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

We should heed well, prior to embarking upon any constitutional interpretation, the advice most recently expressed by Mr. Chief Justice Burger in *Walz* v. *Tax Commission of the City of New York* (1970), 397 US 664 (90

8 Ct 1409, 25 L Ed 2d 697), that it is a Constitution we are expounding and we must, therefore, judiciously refrain from relying upon sweeping utterances from other cases which may be appropriate to those cases but have limited meaning as general principles."[10]

The argument is often advanced that the United States Supreme Court has held unconstitutional all education benefits extended to nonpublic schools. The contrary is true for that Court has upheld statutes providing textbooks [*Cochran* v. *Louisiana State Board of Education* (1930), 281 US 370 (50 S Ct 335, 74 L Ed 913); *Board of Education* v. *Allen* (1968), 392 US 236 (88 S Ct 1923, 20 L Ed 2d 1060)] and bus transportation [*Everson* v. *Board of Education*, *supra*] for nonpublic school children, as well as statutes involving "released time" for attendance at religious instruction or devotional exercises off the premises of public schools [*Zorach* v. *Clauson*, *supra*]. The only cases in which

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[10] These sweeping generalizations have philosophical tap-roots deeply imbedded in the soil of our American history. See, for example, Madison's "Memorial and Remonstrances Against Religious Assessments" reproduced in *Walz*, *supra*, and extensively analyzed and discussed by Mr. Justice Rutledge in *Everson* v. *Board of Education* (1947), 330 US 1, at 33-43 (67 S Ct 504, 91 L Ed 711). While our pragmatic orientation embraces the observation of Mr. Justice Holmes that "a page of history is worth a volume of logic" [*New York Trust Co.* v. *Eisner* (1921), 256 US 345 (41 S Ct 506, 65 L Ed 963)], over-reliance upon the historical analysis, necessarily divorced from its creative facts, is misdirected for the several reasons well expressed by Mr. Justice Brennan concurring in *School District of Abington Township* v. *Schempp* (1963), 374 US 203, at 237-240 (83 S Ct 1560, 10 L Ed 2d 844).

We should, rather, read these broad statements as expressive of fundamental objectives of a contitutional design. See the discussion of Mr. Justice Goldberg concurring in *Schempp*, *supra*, at p 305, and see, also, *Walz*, *supra*, at p 668.

Mr. Justice Douglas, writing for the Court in *Zorach* v. *Clauson*, (1952), 343 US 306 (72 S Ct 679, 96 L Ed 954), noted that, "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." (p 312)

state educational programs have been held violative of the Free Exercise or Establishment Clause by the United States Supreme Court are those involving religious instruction or exercises *in public schools*. *McCollum* v. *Board of Education* (1948), 333 US 203 (68 S Ct 461, 92 L Ed 649) [Religious instruction in public schools]; *School District of Abington Township* v. *Schempp*, *supra* [Bible reading in public schools]; *Engel* v. *Vitale* (1962), 370 US 421 (82 S Ct 1261, 8 L Ed 2d 601) [Reading of prayer in public schools]. Accordingly, ritualistic invocation of the non-constitutional phrase "separation of church and state" will not suffice. What is compelled is an anlysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment.[11]

In drawing the line between the secular and sectarian, between legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion, the United States Supreme Court[12] has consistently utilized the concept[13] of neutrality. This concept of neutrality was well described by the Court in *School District of Abington Township* v. *Schempp* (1963), 374 US 203:

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[11] See Justice Stewart's dissenting opinion in *Schempp*, *supra*, at p 313.

We note well in the context of Mr. Justice Jackson's observation in *Everson*, *supra*, at p 21, that the Federal Constitution says nothing of education. It lays no obligation on the States to provide schools nor undertakes to regulate any system so established.

[12] For a collection of state constitutional analogues to the Free Exercise and Establishment Clauses, see Gabel, Public Funds for Church and Private Schools, pp 148, 149. See, also, 2 Cooley, Constitutional Limitations, ch 18 (8th Ed, 1927).

[13] The same concept obtains although variantly expressed. See Mr. Justice Brennan's formulation in *Schempp*, *supra*, at p 231, and compare with that of Mr. Justice Goldberg concurring in *Schempp*, at p 306, or Mr. Justice Black in Everson, at pp 15, 16.

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one State or Federal Government would be placed behind upon the other to the end that official support of the the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap." (p. 222)

The application of the concept to the facts of the case or controversy is tested by the standard implied in *Everson*, recognized in *Schempp*, reiterated in *Allen*, and applied most currently in *Walz:*

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*" (*Schempp, supra*, p. 222) (Emphasis added.)

Applying the first factor of this two-fold test—the "secular legislative purpose"—we observe that it is only the *legislative purpose* with which we are concerned and not

the sectarian purpose of non-public schools. The fact that the enactment incidentally furthers the sectarian purposes of the individuals or organizations most directly affected does not render it constitutionally impermissible.

It is for the Legislature and not this Court to identify and respond to legitimate public needs to suit the general welfare. The leading authority in this jurisdiction as to what constitutes a public purpose is *The People ex rel. The Detroit and Howell Railroad Co.* v. *The Township Board of Salem* (1870), 20 Mich 452, 475, where Justice Cooley said:

> "I do not understand that the word *public*, when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statemanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people."

See, also, *Miller* v. *State Apple Commission* (1941); 296 Mich 248, 254; *Hays* v. *City of Kalamazoo* (1947), 316 Mich. 443.

The expansion in the scope of legislative activities which may be classed as involving a public purpose to conform to the changing conditions of society has been sustained in *City of Gaylord* v. *Gaylord City Clerk* (1966), 378 Mich. 273.

Our Legislature has spoken forthrightly in section 56 of its desire to foster, improve and advance the quality of secular education, wherever offered, as an integral element of the public welfare. This salutary and beneficient intent and design, moreover, is not a hastily conceived desire to subsidize any or all denominationally-sponsored schools nor a plan effecting a type of "religious gerrymandering," but rather the product of extensive and in-depth studies and investigations under the aegises of both the executive[14] and legislative[15] branches to develop and upgrade a comprehensive system of secular education extant in our State.

It is beyond dispute that sectarian schools pursue the dual goals of religious instruction and secular education [*Pierce* v. *Society of Sisters* (1925), 268 US 510, 532 (45 S Ct 571, 69 L Ed 1070] and that the parents of the school age child may, in the discharge of their duty under the compulsory education laws, send their child to a religious rather than a public school if the school meets the secular educational requirements which the State has the power to impose. *Everson, supra*, at p 18. From this delicate balance of the individual's right to private education and the State's exercise of the police power emerged the determination that if the State must satisfy its interest in secular education through the instrumentality of private schools, the State has a proper interest in the manner in which those schools perform their secular education function and that

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[14] See, e.g., the joint efforts of the executive and legislative branches culminating in the Michigan School Finance Study (commonly referred to as the Thomas Report) under the direction of the Executive Department of Education and financed by the Legislature (PA 1966, No 285). See, also, the Governor's Commission on Educational Reform Report submitted on October 30, 1969.

[15] See, e.g., Joint Legislative Committee Report on Nonpublic Schools, 1969 Legislative Session.

the State's interest in secular education in those schools is a legitimate legislative concern. It was thus concluded by the Court in *Allen, supra*, at pp 247, 248:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

The continuing and intensifying financial crisis which now afflicts all education in this country, particularly nonpublic school education, raises serious doubts as to whether nonpublic schools can continue to properly perform their "task of secular education." *Allen, supra*, at p 248. We take note of the fact that a large number of nonpublic schools have closed during the last year and are continuing to close

at an increasingly alarming rate.[16] These closings are adding to the public schools' financial educational crisis.[17] Under these circumstances it is clear that chapter 2 serves a public purpose.

In view of the express recognition of these factors in the act here involved and the declared public policy upon a matter of general welfare and in view not only of the recent pronouncements of the Federal Courts on this subject[18] but also well-established congressional enactments in cognate fields,[19] we must conclude that the purchase of the services of certified lay teachers teaching secular subjects in eligible units constitutes a secular legislative purpose.

Turning to the second factor of the *Schempp-Allen* test, we must determine whether the act has a primary effect which either advances or inhibits religion, and if we find that it does we must declare the act to be constitutionally infirm.

As observed by Mr. Justice Douglas, concurring in *Schempp*, this constitutionally impermissible effect may be

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[16] For instance, in 1965 there were 10,879 Catholic elementary schools in the United States, at which 4,492,107 pupils were in attendance. In 1969 the number of elementary schools was 10,238, and 3,902,487 pupils attended those schools. Catholic Education Today: An Overview, Office of Public Information, NCEA (1969).

[17] Estimates of School Statistics 1969-70, NCEA (1970); Estimates of School Statistics 1969-70, copyrighted 1969 by the National Education Association. The increase attributable to the enrollment in New York public schools in 1969-70 of students who formerly attended Catholic schools has been estimated to be over $100,000,000 for the 1969-70 school year. *Ibid.*

[18] For current pronouncements on this issue, see *Lemon* v. *Kurtzman* (ED Pa, 1969), 310 F Supp 35, probable jurisdiction noted (1970), 397 US 1034.

[19] See, *e.g.*, 20 USCA, § 445 (direct loans to private elementary and secondary schools for purchase of equipment and minor remodeling).

accomplished in various ways—some blatant, some insidious—but all designed to achieve one end:

> "Establishment of a religion can be achieved in several ways. The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies. Under all of these arrangements the church typically has a place in the state's budget, and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic. Education, too, is usually high on the priority list of church interests. In the past schools were often made the exclusive responsibility of the church. Today in some state-church countries the state runs the public schools, but compulsory religious exercises are often required of some or all students. Thus, under the agreement Franco made with the Holy See when he came to power in Spain, 'The Church regained its place in the national budget. It insists on baptizing all children and has made the catechism obligatory in state schools.'
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> "The vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church's effort to gain and keep adherents." (pp 227, 228)

See, also, the dissenting opinion of Mr. Justice Fortas in *Allen, supra*, at pp 270-272.

Review of the authorities and most significantly the application of the test in *Walz, supra*, discloses that the hallmark of the constitutionally impermissible effect is the excessive government entanglement with religion. *Walz, supra*, at

p 674. Cognizant of the fact that the test is inescapably one of degree, our analyses must be bottomed upon the questions of whether the involvement is *excessive and whether it inherently requires continuing official participation or surveillance* to effect an end which primarily advances or inhibits religion.

Reviewing the provisions of the act under consideration, we note that the act does not generally invest the State with new powers nor invest the eligible units with any new duties. The nonpublic schools have long been subject to State inspection and control over most nonsectarian aspects of their existence. They must meet the same requirements with regard to qualifications of teachers,[20] construction and safety of buildings,[21] sanitary conditions,[22] fire drills and equipment,[23] instruction of handicapped students,[24] selection of textbooks to recognize ethnic-group achievements,[25] and language of instruction[26] as are imposed on public schools. They must periodically file reports with State agencies regarding the attendance[27] and immunization[28] records of their students. Their secular curriculum must be comparable to that of local public schools at the same age and grade level[29]

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[20] MCLA § 388.553 (Stat Ann 1968 Rev § 15.1923).

[21] MCLA § 388.851 (Stat Ann 1968 Rev § 15.1961).

[22] MCLA § 388.551 (Stat Ann 1968 Rev § 15.1921).

[23] MCLA § 29.19, *et seq.* (Stat Ann 1969 § 4.559 (19), *et seq.*).

[24] MCLA § 388.556 (Stat Ann 1968 Rev § 15.1928).

[25] MCLA § 340.365a (Stat Ann 1968 Rev § 15.3365(1)).

[26] MCLA § 340.360 (Stat Ann 1968 Rev § 15.3360).

[27] MCLA § 340.728 (Stat Ann 1968 Rev § 15.3728).

[28] MCLA § 340.376 (Stat Ann 1968 Rev § 15.3376).

[29] MCLA § 340.732 (Stat Ann 1968 Rev § 15.3732).

and must include instruction in the Constitutions and history of our State and national governments.[30] They must admit representatives of the department of education in order to facilitate inspection of sanitary conditions, enrollement records, courses of study and teacher qualifications.[31] The vast extent of the present supervisory authority of the department of education over nonpublic schools is best indicated by the fact that it includes the power to close nonpublic schools for failure to comply with orders enforcing the above requirements.[32]

There appear to be only three aspects of the act which could be denominated as conditions and these deal with the implementation and enforcement of the act itself, rather than impose new involvements by the State or burdens upon the eligible units. The first condition requires the eligible units to maintain such accounting records "as will enable the departments at all times to ascertain that the allowances by the state were in fact used to pay the certified lay teachers teaching secular subjects and not for any other purpose." (sec 62) Second, the eligible units must file a list of the certified lay teachers, their salaries and their certification. (sec 61) Third, the eligible units must certify that they are in compliance with the provisions of the Federal Civil Rights Act and Michigan Const 1963, art 8, § 2.

We do not perceive from the operation of the new but narrowly-drawn provisions, in addition to the many well-established provisions, any unnecessary or excessive government entanglement. Once the appropriation is made and

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[30] MCLA § 340.361 (Stat Ann 1968 Rev § 15.3361).

[31] MCLA § 388.555 (Stat Ann 1968 Rev § 15.1925).

[32] MCLA § 388.554 (Stat Ann 1968 Rev § 15.1924).

the eligible unit elects to participate in this voluntary program, the functional operation of the act is in essence ministerial. We conclude, from the nature and operation of the act under consideration, that the primary effect of this legislation neither advances nor inhibits religion.

As previously pointed out, careful analysis will disclose that every pertinent United States Supreme Court case holding a legislative act to be constitutionally infirm directly involved distinctive religious exercises in public schools. The principles and operational forms of accommodation between the State and sectarian institutions are well set out by Mr. Justice Brennan in *Schempp, supra*, at pp 243-304, and it would be pedantic to add to this scholarly analysis. It will suffice to observe the comment of Mr. Chief Justice Burger in *Walz* at p 669:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

*II. The Michigan Constitutional Provision.*

The 1963 Constitution of our State provides in art 1, §4:[39]

> "Every person shall be at liberty to worship God according to the dictates of his own conscience.

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[39] Religion is also mentioned at the beginning of the Education Article (art 8, § 1): "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

> No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."[24]

A close reading of this section discloses nothing, nor do the opponents of the act point out anything, which expressly prohibits the purchase of the services of lay teachers teaching secular subjects in sectarian institutions. Any constitutional attack on this act must, therefore, be grounded upon a necessary implication of the pertinent section.

The first sentence of art 1, §4, guarantees the liberty to worship God according to the dictates of one's own conscience. Nothing in the act conflicts with or in any way restricts an individual's exercise of this right.

Assuming, without deciding, that the second sentence of art 1, §4, is applicable to legislative appropriations,[25] we

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[24] This section was copied verbatim from the Constitution of 1908. Some of its provisions can be found in the Constitutions of 1835 (art 1, §§ 4, 5) and 1850 (art 4, §§ 39-41).

[25] On its face the sentence restricts only action directed toward or taken by individual "person(s)." It may be that the second sentence, therefore, applies only to individuals while the third sentence restricts State action. We find it unnecessary to decide the point because the act conflicts with neither sentence even if both are read as restricting State action.

cannot construe the purchase of secular educational services to be support of a "place of religious worship." Any possible connection between the act and the erection or maintenance of a place of religious worship is so tenuous and indirect as to be meaningless. Nor can any inference be drawn that a lay teacher teaching secular subjects is a "minister of the gospel" or "teacher of religion,"[38] particularly when the act exempts such religious teachers.

As we pointed out in our discussion of the Federal constitutional question, "incidental benefits" to religious sects or societies do not invalidate an otherwise constitutional statutory program plainly intended and formulated to serve a public purpose. The same rule must apply to our interpretation of the third sentence of art 1, §4. To adopt a strict "no benefits, primary or incidental" rule would render religious places of worship and schools completely ineligible for all State services. There is no evidence, furnished or imaginable, that the people intended such a rule when they adopted this provision of the Constitution. Furthermore, a strict "no benefits" rule might result in direct conflict with the final sentence of art 1, §4, which guarantees that no person shall have his rights, privileges and capacities diminished or enlarged on account of religious beliefs.

Taken together, these sentences are an expanded and more explicit statement of the Establishment and Free Exercise Clauses of the First Amendment to the United

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[38] This is true regardless of whether these terms are given their contemporary (1963) definitions or those commonly attached to them when they were first used in the 1835 Constitution. See *Pfeifer* v. *Board of Education* (1898), 118 Mich 560, wherein it is concluded that "religious teacher" meant "minister" when the term was first inserted in a Michigan Constitution.

States Constitution, the first and fourth sentences constituting the Free Exercise Clause, and the second and third sentences constituting the Establishment Clause. They are, accordingly, subject to similar interpretation.

Adhering to the general principle spoken of in *Walz, supra*, and applying the test formulated in *Everson, Schempp* and *Allen, supra*, we sustain the presumptive constitutionality of the act before us. To do otherwise would be tantamount to repudiation of the Federal Authorities as we understand them and as made binding by the supremacy clause of the Federal Constitution. To accept the arguments of the opponents of the act would sanction open hostility to sectarian institutions. This violates the posture of neutrality incumbent upon the State in its relation to sectarian institutions.

We, at the outset, presume the act to be constitutional and upon inquiry of the relevant authorities and application of the approved tests and criteria, and nothing to the contrary having been disclosed, we are of the opinion that the act before us conforms to the Federal and State Constitutions.

It is hardly necessary to add that no part or portion of this opinion may be taken or construed as having determined any possible question which may arise hereafter with reference either, (a) to the validity of submission to the people of any future amendment of our Constitution, or (b) of construction or application of any such future amendment.

THOMAS E. BRENNAN, C.J.
EUGENE F. BLACK, J.
THOMAS G. KAVANAGH, J.
Concurred with
THOMAS M. KAVANAGH, J.

**STATE OF MICHIGAN**
**SUPREME COURT**

**In the Matter of the**

**LEGISLATURE'S REQUEST FOR AN OPINION ON THE CONSTITUTIONALITY OF CHAPTER 2 OF ENROLLED SENATE BILL NO. 1082.**

**BEFORE THE ENTIRE BENCH**
**ADAMS, J.**

**I**

**Free public education for all is a responsibility of the State. It is State business. Art 8, § 2, Constitution of 1963. Religion is the concern of each individual as he chooses to be so concerned and must not be interfered with by the State in any way. It is private business. Art 1, § 4, Constitution of 1963; First Amendment to the United States Constitution. Religions have flourished or waned according to the conscience of the individual and the strength or weaknesses of the particular religion.**

**Some religions have provided private schools to teach and perpetuate a particular religion. Religious education is a support and an adjunct to the religion. Chapter 2 of the State School Aid Act, as added by PA 1970, No 100 (MCLA § 388.665, et seq; Stat Ann § 15.1919(105), et seq), proposes to augment the services of the public school system of this State by contractual agreements with private schools for the education of students in those schools in subjects taught in the public schools.**

**It is said that it is necessary to supplement the public school system because it cannot meet the challenge of serving the needs of the children of this State if the sectarian schools are forced to close. Beginning with such admission**

of failure, the State is asked to surrender its constitutionally-imposed duty of providing public schools for the children of this State to those religious groups that can afford private schools with the help of the public treasury.

Private sectarian schools are dual purpose institutions.[37] As a condition of their existence and because they are so required by the State, they provide an education in subjects taught in public schools. Their primary purpose and the reason why they have come into being in lieu of the public school is to provide a religious education in a particular faith.[38] The public schools cannot teach religion. *McCollum* v. *Board of Education* (1948), 333 US 203 (68 S Ct 461, 92 L ed 649); *School District of Abington Township* v. *Schempp* (1963), 374 US 203 (83 S Ct 1560, 10 L ed 2d 844). Consequently, the child who is taught in the public schools must be guided by his parents or his church or himself or look elsewhere in choosing his religion.

The child taught in a private sectarian school receives an education as provided by the public schools and a religious education in the faith of a particular religion. Such religious advocacy places the school beyond the pale of assistance from the public purse. Art 1, § 4, Constitution of 1963, states: "No money shall be appropriated or drawn from

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[37] This opinion refers to sectarian schools rather than private non-sectarian schools since Chapter 2, in § 56, speaks of the "sectarian function" of the private schools to be benefited.

[38] In the case of *Walz* v. *Tax Commission of the City of New York* (1970), 397 US 664 (90 S Ct 1409, 25 L ed 2d 697), the Court said (p 671):

"Surely, bus transportation and police protection to *pupils who receive religious instruction* 'aid' that particular religion to maintain schools that *plainly tend to assure future adherents to a particular faith* by having control of their total education at an early age. *No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools.*" (Emphasis added.)

the treasury for the benefit of any religious sect or society***." What the State cannot do in its public schools—teach religion — it cannot do by indirection in private schools, nor can money be appropriated to private schools whose primary purpose is the teaching of religion since this obviously benefits a religious sect or society.

II

Chapter 2 will cause "an excessive government entanglement with religion." *Walz* v. *Tax Commission of the City of New York* (1970), 397 US 664 (90 S Ct 1409, 25 L ed 2d 697). In that case, the Supreme Court of the United States, speaking through Chief Justice Burger, said (p 675):

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statuory or administrative standards***."

Chapter 2 provides for yearly application for funds (§55(c)). It contemplates an annual appropriation from the general fund to the Department of Education (§57). The sum so appropriated is to be used by the Department of Education to purchase from eligible units educational services (§59). Within the limit of the appropriation for a particular year, the superintendent is required to pay to eligible units, in quarterly installments, a percentage of the salaries of certified lay teachers within each teaching unit. If total actual cost of service rendered by an individual teacher exceeds actual cost of comparable service in comparative public schools, the State Board of Education must disapprove the total actual cost as to such teacher and make no further payment until a redetermina-

tion that the total actual cost does not exceed the total actual cost of comparable service in such public schools. When a statewide budget system becomes operational, amounts paid for salaries must not exceed 75% of the salary allowances adopted by the legislature for comparable professionals in local school district budgets (§60). Prior to the first day of the quarter for which payments are due, eligible units must certify a list of lay teachers to the superintendent who must make certain determinations with regard to the allocation of salary for each teacher. The superintendent must prepare appropriate vouchers and the State Treasurer must pay to the eligible units in accordance with the same (§61). The eligible units must maintain accounting systems to enable the department at all times to ascertain that the allowances by the State were in fact used to pay the certified lay teachers (§62). The Department of Education is required to promulgate rules to carry out the provisions of Chapter 2 (§63). Anyone aggrieved by not having been declared an eligible unit may proceed as in a contested case (§64).

The above is but a brief summary of some of the provisions of Chapter 2. All of its provisions must be examined to determine the full extent of the pregnant involvement between private sectarian schools and the State. See especially section 57 through 64.[20]

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[20] "Sec. 57. A sum necessary to fulfill the requirements of this chapter is appropriated from the general fund to the department of education for the fiscal year ending June 30, 1971, and for each fiscal year thereafter.

"Sec. 58. The sum so appropriated shall not exceed 2% of the total expenditures from state and local sources for the support of the free public elementary and secondary public education system in this state in the last preceding fiscal year, as determined or estimated when necessary, by the superintendent from records available to him and financial accounting records of public school units maintained

in accordance with rules promulgated by the state department of education. For the purpose of such limitation, total expenditures shall not include the amounts expended for bus transportation and auxiliary services for public and nonpublic school students. This appropriation shall not exceed $22,000,000.00 during the 1970-71 school year beginning July 1, 1970.

"Sec. 59. The sum so appropriated shall be used by the department of education to purchase from eligible units educational services in secular subjects for the benefit of pupils attending eligible units.

"Sec. 60. Within the limit of the appropriation under this chapter for a particular fiscal year, the superintendent shall pay to an eligible unit, in quarterly installments, a sum not to exceed in the fiscal years 1970-71 and 1971-72, 50% of the salaries of certified lay teachers within such unit teaching secular subjects and in the fiscal years thereafter 75% of such salaries. If the state board of education determines that if the total actual costs of such educational service rendered by such individual is in excess of the total actual cost of comparable educational service rendered in approximately like circumstances of geographical area and economic condition in the public schools, the state board of education shall disapprove the total actual cost of such educational service rendered by such individual and no further payment shall be made to such individual until the state board of education makes a redetermination that the total actual cost for such educational service does not exceed the total actual cost of comparable educational service in such public schools. When a statewide budget system becomes operational, the amounts paid for such salaries shall not exceed 75% of the salary allowances adopted by the legislature for the purpose of determining such allowances for comparable professionals in local school district budgets in a particular fiscal year.

"Sec. 61. Prior to the first day of the quarter for which payments are due, an eligible unit shall certify to the superintendent on a form prepared by him, a list of certified lay teachers teaching secular subjects employed by such unit, the salaries and certification of each. When the superintendent finds that a certified lay teacher is providing less than a full schedule of instruction in secular subjects, he shall allocate that part of the salary due such teacher for such instruction in secular subjects and shall prepare a voucher for payment to the eligible unit for the allocated portion of the salary of such teacher as provided in section 60. The superintendent shall prepare appropriate vouchers and the state treasurer shall pay to the eligible units the aggregate allowance for the salaries for the teachers employed by the unit.

"Sec. 62. As an express condition of continued certification, the eligible units shall maintain such accounting systems as will enable the department at all times to ascertain that the allowances by the state were in fact used to pay the certified lay teachers teaching secular subjects and not for any other purpose.

To say, as Justice Kavanagh states in his opinion, that the provisions of the act do not generally invest the State with new power or invest the eligible units with any new duties is to ignore the plain provisions of the act. To cite only one example, the act defines a certified lay teacher as follows:

> "Sec 55(b). 'Certified lay teacher' means a teacher who holds a valid certificate or permit issued by the state to teach in the public schools of this state and is not a member of a religious order, who by vow or promise has chosen the religious life of poverty as a vocation or who wears any distinctive habit, or both."

The State must, under this definition, determine what constitutes a distinctive habit. The previous regulation of private schools referred to by Justice Kavanagh is of quite a different sort, being designed to require private schools to meet the same standards as are imposed upon public schools.

In the case of *DiCenso* v. *Robinson* (ED R.I. 1970), ——— F Supp ———, a three-judge United States District Court, speaking through Judge Coffin, analysed and applied the federal standards to a situation similar to the one in this case, as follows (p ———):

> "The appropriate standard to be used in this

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"Sec. 63. This chapter shall be administered by the department of education which shall promulgate rules to carry out the provisions of this chapter in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948.

"Sec. 64. Prior to the beginning of each fiscal year the superintendent shall prepare a list of eligible units. Anyone aggrieved by not having been declared an eligible unit may proceed as in a contested case within the meaning of Act No. 306 of the Public Acts of 1969 to have his status determined."

case is the purpose and effect test first enunciated in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963): '[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' The purpose of the statute in this case was not intended to advance or interfere with religion. The quality of education in the non-public schools is a legitimate legislative concern.

"It is more difficult to determine the statute's primary effect. The opponents of the statute argue that 'primary' means 'essential' or 'fundamental.' The statute's defenders claim that 'primary' means 'first in order of importance.' The problem of definition is critical in this case since the statute has two significant effects: it aids the quality of secular education; it provides support to a religious enterprise. *To examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach is an unrealistic approach.* The expenses of a religious institution may be apportioned in a variety of ways among its secular and religious activities, and sophisticated bookkeeping could pave the way for almost total subsidy of religious institutions by assigning the bulk of the institution's expenses to secular activities. Equally important, government aid to purely secular activity could nevertheless involve the state deeply in the

workings of religious institutions.

"These deficiencies in Schempp were recognized in *Walz* v. *New York City Tax Comm.*, 38 LW 4347 (U.S. 1970). That case stated that '[e]ach value judgment under the Religious Clauses must *** turn on whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.'

"This test refines Schempp by removing the suggestion that the single predominant effect of the statute may be isolated by a process of deductive reasoning based upon principle and precedent. Instead, the focus is on whether the statute fosters excessive entanglement between government and religious institutions and whether the degree of entanglement is likely to promote the substantive evils against which the First Amendment guards.

"Two significant dangers are apparent in the effect of this statute. The Act authorizes a subsidy which, unlike the exemption involved in Walz, must be annually renewed. Efforts of the various sects to obtain government financing of those few denominations that support school systems will inevitably excite bitter controversy. Also, significant state subsidies will inevitably pproduce significant state limitations on the freedom of denominational schools. A direct subsidy such as this requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), or the loaning of textbooks in *Board of Education* v. *Allen*, 392 U.S. 236, 36 LW 4538 (1968). Under this statute, the commissioner of education could

and must monitor parochial school expenditures and in close cases determine which spending is religious and which is secular. Equally important, this statute promotes a type of involvement that may significantly limit the internal freedom of parochial schools. The Act has already restricted the role of teachers. Some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for statutory aid." (Emphasis added.)

III

Finally, § 55(c) of Chapter 2 requires a certificate from each applying unit of compliance with § 2 of art 8 of the Constitution of 1963, the second sentence of which reads:

> "Every school district shall provide for the education of its pupils *without discrimination as to religion*, creed, race, color or national origin." (Emphasis added.)

If this requirement of § 55(c) of Chapter 2 is followed, it will nullify the stated purpose of the act as all private sectarian schools will be unable to participate in the benefits of the act. The hallmark of the private sectarian school is that it teaches a particular religion and maintains a particular religious environment. Such a school cannot provide for the education of its pupils "without discrimination as to religion," religion being the very purpose for the school's existence.

Chapter 2 is violative of the Michigan Constitution of 1963 and the Constitution of the United States.

JOHN R. DETHMERS, J.
Concurred with
PAUL L. ADAMS, J.

# APPENDIX "B"
## CHAPTER 2

(Chapter 2 added by Pub Acts 1970, No. 100, eff September 1.)

Sec. 55. As used in this chapter:

(a) "Superintendent" means the state superintendent of public instruction or any successor to the powers, duties and functions of that office.

(b) "Certified lay teacher" means a teacher who holds a valid certificate or permit issued by the state to teach in the public schools of this state and is not a member of a religious order, who by vow or promise has chosen the religious life of poverty as a vocation or who wears any distinctive habit, or both.

(c) "Eligible unit" means a board of education, association or corporation operating a nonpublic school or system of nonpublic schools, which is complying with all educational standards as required by law, has filed with the state department of education a certificate that it complies with section 2 of article 8 of the state constitution and title VI of the civil rights act of 1964 (Public Law 88-352) in effect on December 1, 1969, has applied on a form provided by the superintendent for aid provided by this chapter for the fiscal year 1970-71 by August 15, 1970 and for each succeeding fiscal year by October 1 prior to the beginning of the fiscal year for which such aid is sought and is certified by the superintendent as having substantially complied with all state laws concerning evaluation of pupils and other laws applicable to nonpublic schools. If an application is not made it shall be conclusive evidence that an eligible unit does not desire to participate in the provisions of this chapter for that year.

(d) "Secular subjects" means those courses of instruc-

tion commonly taught in the public schools of this state including but not limited to language skills, mathematics, science, geography, economics, history, as defined by the state department of education, which shall expressly not include any course of instruction in religious or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship. Textbooks used in such secular subjects shall meet the same criteria as required of textbooks used in the public schools.

Sec. 56. The legislature finds that large numbers of children are being educated in nonpublic elementary and high schools in this state and further finds that increasing costs of education are impairing the quality of secular education of children enrolled in nonpublic schools lawfully selected by their parents. These schools perform, in addition to their sectarian function, the task of secular education. The legislature declares as public policy of the state that the public good and general welfare require that state appropriations now provided to public school districts under this act for the purpose of furnishing opportunities for public school children to secure a quality secular education be extended to assist in providing opportunities for quality secular education to children attending nonpublic elementary and high schools, as part of a general program to foster and encourage knowledge so as to provide a mature citizenry capable of contributing to good government, and to the safety and the economic and civil well-being of all the people of this state.

Sec. 58. The sum so appropriated shall not exceed 2% of the total expenditures from state and local sources for the support of the free public elementary and secondary public education system in this state in the last preceding fiscal year, as determined or estimated when necessary, by the superintendent from records available to him and financial

accounting records of public school units maintained in accordance with rules promulgated by the state department of education. For the purpose of such limitation, total expenditures shall not include the amounts expended for bus transportation and auxiliary services for public and nonpublic school students. This appropriation shall not exceed $22,000,000.00 during the 1970-71 school year beginning July 1, 1970.

Sec. 59. The sum so appropriated shall be used by the department of education to purchase from eligible units educational services in secular subjects for the benefit of pupils attending eligible units.

Sec. 60. Within the limit of the appropriation under this chapter for a particular fiscal year, the superintendent shall pay to an eligible unit, in quarterly installments, a sum not to exceed in the fiscal years 1970-71 and 1971-72, 50% of the salaries of certified lay teachers within such unit teaching secular subjects and in the fiscal years thereafter 75% of such salaries. If the state board of education determines that if the total actual costs of such educational service rendered by such individual is in excess of the total actual cost of comparable educational service rendered in approximately like circumstances of geographical area and economic condition in public schools, the state board of education shall disapprove the total actual cost of such educational service rendered by such individual and no further payment shall be made to such individual until the state board of education makes a redetermination that the total actual cost for such educational service does not exceed the total actual cost of comparable educational service in such public schools. When a statewide budget system becomes operational, the amounts paid for such

salaries shall not exceed 75% of the salary allowances adopted by the legislature for the purpose of determining such allowances for comparable professionals in local school district budgets in a particular fiscal year.

Sec. 61. Prior to the first day of the quarter for which payments are due, an eligible unit shall certify to the superintendent on a form prepared by him, a list of certified lay teachers teaching secular subjects employed by such unit, the salaries and certification of each. Where the superintendent finds that a certified lay teacher is providing less than a full schedule of instruction in secular subjects, he shall allocate that part of the salary due such teacher for such instruction in secular subjects and shall prepare a voucher for payment to the eligible unit for the allocated portion of the salary of such teacher as provided in section 60. The superintendent shall prepare appropriate vouchers and the state treasurer shall pay to the eligible units the aggregate allowance for the salaries for the teachers employed by the unit.

Sec. 62. As an express condition of continued certification, the eligible units shall maintain such accounting systems as will enable the department at all times to ascertain that the allowance by the state were in fact used to pay the certified lay teachers teaching secular subjects and not for any other purpose.

Sec. 63. This chapter shall be administered by the department of education which shall promulgate rules to carry out the provisions of this chapter and in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948.

Sec. 64. Prior to the beginning of each fiscal year the superintendent shall prepare a list of eligible units. Anyone

aggrieved by not having been declared an eligible unit may proceed as in a contested case within the meaning of Act No. 306 of the Public Acts of 1969 to have his status determined.

Sec. 65. It is understood that certified lay teachers who receive payment under this chapter are not employees of the state and therefore are not eligible for membership in any public school employee retirement system under the provisions of Act No. 136 of the Public Acts of 1945, as amended, being sections 38.201 to 38.357 of the Compiled Laws of 1948 nor shall they be under the provisions of Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Compiled Laws of 1948, nor subject to the provisions of Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948.

Sec. 66. (1) If any portion of this act or the application thereof to any person or circumstances shall be found invalid by a court, such invalidity shall not affect the remaining portions or application of this act which can be given effect without the invalid portion or application if the court so indicates.

(2) It is the intent of the legislature that an advisory opinion upon the constitutionality of chapter 2 of this amendatory act be sought pursuant to article 3, section 8, of the state constitution from the supreme court, after it has been enacted into law but before its effective date.

Sec. 66a. The provisions of this chapter shall take effect September 1, 1970, except that it is the intent of the legislature that no expenditures of state funds be made pursuant to the provisions of chapter 2 until the Michigan supreme court renders such advisory opinion.

## APPENDIX "C"

## STATE OF MICHIGAN
## IN THE SUPREME COURT

In the Matter of the Legislature's
Request for an opinion on the
constitutionality of Chapter 2 of
Enrolled Senate Bill No. 1082

No. 52933

**APPLICATION OF HAROLD R. SMITH FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE AND AS A PERSON INTERESTED IN THE DETERMINATION OF THE CONSTITUTIONALITY OF CHAPTER 2 OF ENROLLED SENATE BILL NO. 1082**

NOW COMES Harold R. Smith and files this application as a taxpayer and as a person interested in the determination of the constitutionality of Chapter 2 of Enrolled Senate Bill No. 1082 by and under the order of this Honorable Court pursuant to concurrent resolution of both Houses of the Legislature under authority of Section 8 of Article III of the Michigan Constitution, and respectfully represents:

1. Chapter 2 of Senate Bill No. 1082 of 1970 appropriates from the general fund to the Department of Education for the fiscal year ending June 30, 1971, and for each fiscal year thereafter, sums for the support of non-public schools the sum for the school year beginning July 1, 1970, not to exceed, however, Twenty-Two Million Dollars ($22,000,000).

2. The funds appropriated under said Chapter 2 are to be used under the administration of the Department of Education to finance the operation of non-public schools, in-

cluding church-related parochial schools where religion is taught, although the appropriated funds are to be used for the teaching of secular subjects in such schools.

3. Section 8 of Article III of the Constitution of the State of Michigan authorizes the Legislature to request the opinion of the Supreme Court of Michigan as to the constitutionality of legislation after its enactment, but before its effective date. The foregoing legislation has been enacted and has been signed by the Governor. The effective date, according to the Statute, is September 1, 1970.

4. Section 66 of said Statute states the legislative intent that the opinion of the Supreme Court of Michigan, upon the constitutionality of said Chapter 2, be sought pursuant to said Section 8 of Article III of the State Constitution.

5. The opinion of the Supreme Court of Michigan has been sought by concurrent resolution of both Houses of the Legislature.

6. Section 66a of said Statute states that:

> "It is the intention of the Legislature that no expenditures of state funds be made pursuant to the provisions of Chapter 2 until the Michigan Supreme Court renders such advisory opinion."

7. Chapter 2 of the foregoing Statute, by appropriating funds for the support and maintenance of non-public schools where religion is taught, contravenes and is repugnant to Article I of Amendments to the Constitution of the United States and is, for that reason, unconstitutional and void.

8. Chapter 2 of the foregoing Statute, by appropriating funds or the support and maintenance of non-public schools where religion is taught contravenes and is repugnant to Article XIV of Amendments to the Constitution of the

United States and, for that reason also, is unconstitutional and void.

9. If the Supreme Court of Michigan should render an advisory opinion upholding the constitutionality of Chapter 2 of said Statute, said opinion will, in effect, be a final judgment not only with respect to the validity of said Statute, but under the provisions of Section 66a will give an immediate effect to the provisions authorizing the expenditures of state funds or the support of schools where religion is taught.

10. The final judgment of the Supreme Court of Michigan, if rendered in the foregoing manner, will draw in question validity of Chapter 2 of said Statute on the grounds of its being repugnant to the Constitution and laws of the United States.

11. Applicant is submitting for filing herewith twenty-four type-written copies of a brief as amicus curiae.

WHEREFORE, Applicant respectfully requests that said brief and copies to be accepted for filing pursuant to the order of this Honorable Court.

HAROLD R. SMITH
225 Merriweather
Grosse Pointe Farms, Michigan
48236

Dated: August 14, 1970.

## APPENDIX "D"

**AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourteenth day of September in the year of our Lord one thousand nine hundred and seventy.**

**Present the Honorable**

**THOMAS E. BRENNAN,**
**Chief Justice,**

**JOHN R. DETHMERS,**
**HARRY F. KELLY,**
**EUGENE F. BLACK,**
**THOMAS M. KAVANAGH,**
**PAUL L. ADAMS,**
**THOMAS G. KAVANAGH,**
**Associate Justices**

This Court was requested by the legislature, pursuant to Art. 3, Sec 8 of the Michigan Constitution of 1963 to pass upon the constitutionality of chapter 2 of amendatory Act No. 100 of the Public Acts of 1970.

Briefs having been filed and the cause submitted, after due consideration of the issues raised in the messages from the legislature and the governor and the briefs amicus curiae, this Court finds as to all issues raised herein, no conflict between chapter 2, Act No. 100, PA 1970 and the existing provisions of the State and Federal constitutions. Opinion or opinions to follow. Dethmers, Kelly and Adams dissent.

IN THE SUPREME COURT OF THE
STATE OF MICHIGAN

HAROLD R. SMITH,

Appellant,

NO. 52933

-vs-

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT LUTHERAN SCHOOLS OF MICHIGAN-MISSOURI SYNOD, MICHIGAN ASSOCIATION OF NON-PUBLIC SCHOOLS, MICHIGAN CATHOLIC CONFERENCE, MICHIGAN FEDERATION OF CITIZENS FOR EDUCATIONAL FREEDOM, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, NATIONAL UNION OF CHRISTIAN SCHOOLS, MICHIGAN EDUCATION ASSOCIATION, FRANK J. KELLEY, ATTORNEY GENERAL and ROBERT A. DERENGOSKI, SOLICITOR GENERAL, STATE OF MICHIGAN,

Appellees.

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that HAROLD R. SMITH, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan entered in

this action on September 14, 1970, determining that there was no conflict between Chapter 2 of amendatory Act No. 100, Public Acts of Michigan for 1970 and the provisions of the Constitution of the United States and the State of Michigan.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Counsel and Pro Se

December 8, 1970

## MOTION TO DISMISS OR AFFIRM

NOW comes Frank J. Kelley, as Attorney General of the State of Michigan, by Robert A. Derengoski, Solicitor General, and Stewart H. Freeman, Assistant Solicitor General, to respectfully move that this Honorable Court dismiss this appeal or alternatively that the Advisory Opinion below be affirmed.

A brief in support of this motion is appended hereto. Simply stated, the Attorney General contends that an amicus curiae may not appeal to this Court from an advisory opinion of a State supreme court particularly where proceedings involving the assailed statute are still pending in the State court.

Wherefore, it is prayed that the appeal be dismissed or, alternatively, that the Advisory Opinion below be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stewart H. Freeman,
Assistant Solicitor General

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In The

SUPREME COURT OF THE UNITED STATES

No. 1056

October Term, 1970

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ADVISORY OPINION re CONSTITUTIONALITY OF PA 1970, NO. 100

---

Appeal From The Supreme Court Of The State of Michigan by Harold L. Smith, Amicus Curiae

---

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

COUNTERSTATEMENT OF QUESTION PRESENTED

May an amicus curiae "appeal" to this court from an Advisory Opinion of the Supreme Court of the State of Michigan, particularly where proceedings involving the assailed statute are still pending in the state court?

The Attorney General of Michigan contends that the answer is "NO."

## COUNTERSTATEMENT OF THE CASE

Act 100 of the Michigan Public Acts of 1970, commonly known as the State School Aid Bill, was signed into law by the Governor of Michigan on July 20, 1970. By House Concurrent Resolution No. 435, and pursuant to Article 3, Section 8, of the 1963 Michigan Constitution, the State legislature requested the State Supreme Court to pass upon the constitutionality of this act.

Harold R. Smith, an attorney of the State of Michigan, was granted permission by the Michigan Supreme Court to enter the Advisory Opinion matter as amicus curiae. Mr. Smith thereupon filed a one page brief citing one unpublished decision. (1b). In this Court, Mr. Smith designates himself as the "appellant" and names certain of the other amici curiae as "appellees."

Thereafter, in October of 1970, the Supreme Court of Michigan rendered its Advisory Opinion as to Act 100. See, *Advisory Opinion re Constitutionality of PA 1970, No. 100* (1970), 384 Mich 82.

Then, at the general election of November 3, 1970, the People adopted "Proposal C" which purported to amend the 1963 Michigan Constitution by adding the following language:

> "Article 8, Section 2. No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary

school. No payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public moneys or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

On December 7, 1970, in response to an Executive Message from the Honorable William Milliken, Governor of Michigan, the Supreme Court of Michigan ordered a declaratory judgment action then pending in the Circuit Court of Grand Traverse County, Michigan, certified to the Supreme Court. (2b).

On December 17, 1970, by a series of special orders the Supreme Court of Michigan took full jurisdiction of the entire controversy and ordered *inter alia*:

"IT IS FURTHER ORDERED that pending final disposition of this cause, and until further order of this Court, the defendant Superintendent of Public Instruction shall be enjoined and restrained from disbursing any public funds pursuant to the provisions of Chapter 2 of Act 100 of the Public Acts of 1970." (6b).

Other orders issued that same day directed that briefs be submitted by December 30, 1970, and that oral argument on the entire controversy be held before the Supreme Court of Michigan on January 5, 1971. (7b).

## ARGUMENT

**An amicus curiae may not "appeal" to this court from an Advisory Opinion of the Supreme Court of Michigan, particularly where proceedings involving the annulled statute are still pending in the state court.**

### I.

### PETITIONER HAS NO STANDING TO APPEAL

One "who is not a party to a record and judgment is not entitled to appeal therefrom." *Ex parte Leaf Tobacco Board of Trade* (1911), 222 US 579, at 581; *Ex parte Cockroft* (1881), 104 US 578; *Indiana v. Liverpool, London & Globe Ins. Co.* (1883), 109 US 168; *Bayard v. Lombard* (1850), 9 How. 530. Thus, an amicus curiae in the court below has no standing to file an appeal to this Honorable Court. *Ex parte Cutting* (1876), 94 US 14, at 20-22; *United Auto Workers v. Scofield* (1965), 382 US 205, at 209.

Furthermore, the petitioner in this Court did not make specific and plain in the State court any contention that the application of this statute would be void under Federal law. Even viewing the decision below as a "final" order amounting to a validation of a State statute, *this* petitioner has no standing to appeal to *this* Court. His entire brief in the Michigan Supreme Court (consisting of a one-page-one citation argument) is directed at the proposition that a "similar" statute was "adjudicated unconstitutional" by a Federal court. (1b). Nowhere in his brief did the petitioner assail this *Michigan* statute as repugnant to a Federal constitutional provision, law or treaty. Thus, *this*

petitioner has no standing under Title 28 USC §1257 to appeal to this Court since he did not "draw in question" on Federal grounds the statute which he here assails. See, *Hanson v. Denckla* (1958), 357 US 235, at 244; *Mergenthaler Linotype Co. v. Davis* (1919), 251 US 256, at 259.

## II.

**This "appeal" presents no final judgment or decree for this court to review.**

By its terms, Article III, Section 2, of the Constitution of the United States extends the judicial power only to "cases" or "controversies." And, Title 28, USC §1257 allows appeals to this Court only from "final judgments and decrees."

The matter at bar is neither case nor controversy and on the Constitutionality of the assailed statute is neither a final judgment nor decree. At bar, rather, is an "appeal" from an Advisory Opinion. Thus, there is no true case or controversy here presented.

Moreover, as indicated by the Michigan Supreme Court's orders of December 17, 1970 (6b-9b), this matter is still very much in litigation. The very statute here assailed may not be enforced "pending final disposition" of a still pending cause (6b), and the entire matter is to be submitted to the Supreme Court of Michigan on January 5, 1971. Thus, this "appeal" is not from the "final word of a final court." *Market Street R. Co. v. Railroad Commission* (1944), 324 US 548, at 551. As stated in *Department of Banking v. Pink* (1942), 317 US 264, at 268:

"... the test ... [is] whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court ..."

## III.

**No review by this court is presently necessary since the entire matter may be disposed of on adequate non-federal grounds.**

There appears to be no authority, Constitutional or statutory, which would permit this Court to review the judgment of a State court of last resort declaring a State statute to be repugnant to the *State's* constitution. If, therefore, the Supreme Court of Michigan should, in the proceedings scheduled for January 5, 1971, determine that "Proposal C" effectively amended the Michigan Constitution, and if the Michigan Supreme Court should then find that Act 100 is in conflict with Proposal C—a most likely prospect given the express language of Proposal C—there would be no issue left for this Court to review. There is nothing in this record to indicate the desirability or the necessity for *anticipatory* review of the final judgment in this matter.

## IV.

**If, however, the matter is properly before this court, then the Advisory Opinion below should be affirmed.**

Assuming arguendo that an amicus curiae may appeal from a non-final non-adjudicatory Advisory Opinion, then we contend that, for the reasons so well-stated by Mr.

Justice Kavanagh in his opinion for the Supreme Court of Michigan, Act 100 of the Michigan Public Acts of 1970 is not in conflict with Federal law. Accordingly, the Advisory Opinion below should be affirmed.

## CONCLUSION

For the aforegoing reasons, Frank J. Kelley, Attorney General of Michigan, contends that this appeal is not within the jurisdiction of this Honorable Court, but that if it is, then the Advisory Opinion below should be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stewart H. Freeman,
Assistant Solicitor General

The Seven Story Office Building
525 W. Ottawa Street
Lansing, Michigan 48913

Dated:

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STATE OF MICHIGAN

IN THE SUPREME COURT

In the Matter of the Legislature's Request for an opinion on the constitutionality of Chapter 2 of Enrolled Senate Bill No. 1082

No. 52933

BRIEF OF HAROLD R. SMITH

The State of Rhode Island recently passed a statute containing provisions similar to those of Chapter 2 of Enrolled Senate Bill No. 1082 of 1970. The Statute, on June 15, 1970, was adjudicated unconstitutional under Chapter 1 of Amendments to the Constitution of the United States, by a three-judge federal court, in Di Grazia v. Robinson. The opinion is so recent that it may be found in the July 14, 1970 issue of the United States Law Week, 39 LW 2023.

The constitutionality of Chapter 2 of said Michigan Statute, under the Michigan State Constitution, is not considered in this brief for the reason that the subject will be covered in briefs of various amici curiae.

Respectfully submitted,

HAROLD R. SMITH
225 Merriweather
Grosse Pointe Farms, Michigan
48236

Dated: August 14, 1970

RECEIVED
AUG 17 1970

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of December in the year of our Lord one thousand nine hundred and seventy.

MR 7-273

Present the Honorable-

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
KELLY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

EXECUTIVE MESSAGE OF GOVERNOR RE CERTIFICATION OF QUESTIONS PERTAINING TO PROPOSAL C — 53144

The Governor having on December 4, 1970, addressed an Executive Message to the Supreme Court with respect to the entitled cause, representing to the Supreme Court that the Circuit Court of Grand Traverse County has pending before it controlling questions of public law involved in the entitled case or controversy, and such questions are of such public moment as to require early determination,

NOW, THEREFORE, the Supreme Court does order and authorize the Circuit Court for Grand Traverse County to certify such questions contained in the Executive Message to the Supreme Court, a copy of which is attached hereto, with a statement of facts relative thereto, sufficient to make clear the application of such questions:

"And, it is further Ordered that further proceedings relative to such case are hereby stayed pending receipt of the certification of the trial court:

"And, it is further Ordered that in addition to the questions referenced in the Executive Message, the trial court shall certify the following question to the Supreme Court as a controlling question of public law involved in the pending case: "Was proposal C purporting to amend Article VIII, Section 2 of the Michigan Constitution of 1963, properly submitted to the electorate at the November 3, 1970, General Election, in conformity with Article XII, Section 2 of the 1963 Constitution, so as to constitute a valid amendment to the Constitution?"

STATE OF MICHIGAN—ss.

I, Donald F. Watson, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Watson
Deputy Clerk

[redacted]

[redacted]

December 4, 1970

The Honorable Chief Justice and Associate Justices of the Supreme Court:

William C. Milliken, Governor of the State of Michigan, pursuant to rule 787 of the General Court Rules of 1963, appears before this Court and respectfully states as follows.

There is presently pending in the Circuit Court for the County of Grand Traverse, State of Michigan, the case of THE SCHOOL DISTRICT OF THE CITY OF TRAVERSE CITY vs. FRANK J. KELLEY, ATTORNEY GENERAL, STATE BOARD OF EDUCATION, AND JOHN W. PORTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, AND ST. FRANCIS SCHOOL, ET AL., Civil Action No. 2356.

This matter seeks declaratory relief as well as judicial interpretation of an amendment to Article 8, Section 2 of the Michigan Constitution of 1963, which amendment was adopted by the people at the general election held November 3, 1970. The amendment reads:

> "Article 8, Section 2. No public moneys or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivisions or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public moneys or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

Absent judicial intervention, pursuant to the provisions of Article 12, Section 2, Paragraph 4 of the Michigan Constitution of 1963, this amendment (hereinafter referred to as "Proposal 'C'") will become effective at the end of 45 days after the general election, viz., December 19, 1970.

Since the institution of the instant litigation on November 12, 1970, the Attorney General, on December 10, 1970, filed, on behalf of all initial parties-defendant (hereinafter referred to as "defendants"), "DEFENDANTS' ANSWER,

[illegible] DEFENSE AND COUNTERCLAIMS FOR DECLARATORY RELIEF." Subsequently, on December 1, 1970, the Court permitted joinder of St. Pancratz School, et al., as intervenor defendants (hereinafter referred to as "intervenors") and said intervenors filed, under date of December 28, 1970, their "Answer-Claim and Cross-Claim" to the action in chief.

This matter now raises controlling questions of public law which are of such public moment as to require early determination. Dependent upon the resolution of these questions is the immediate administration and operation of the entire elementary and secondary educational program and structure, public and nonpublic, of the State of Michigan.

Accordingly, in view of the magnitude and urgency of this matter, I respectfully submit the following suggested questions for, upon certification by the Circuit Court, this Court's immediate consideration and determination. In all instances these questions are raised as to both the express terms and operative effect of Proposal C:

1. Does Proposal C preclude the provision, through shared time or dual enrollment programs, of elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

2. Does Proposal C preclude the provision of auxiliary services (as defined in Section 622 of Act 269, P.A. 1955, being Section 1 of Act 343, P.A. 1965, being Section 340.622 of the Compiled Laws of 1948) to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

3. Does Proposal C preclude use of federal moneys, made available to the State of Michigan through Title I of the Elementary and Secondary Education Act of 1965, being 20 USC, Section 241a. et seq for the purpose of providing elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

4. Does Proposal C preclude direct or indirect assistance to private institutions providing educational services to children who are placed there pursuant to court order?

5. Does Proposal C deny to intervenors and their respective represented class or classes, any tax exemption, including but not limited to any exemption or exemptions from property, income, sales, use, franchise, intangibles, inheritance, "in lieu of", or any other tax or taxes, allowed them, pursuant to the Constitution and laws of the State of Michigan, prior to the adoption of Proposal C?

6. Does Proposal C deny to intervenors and their respective represented class or classes due process of law or equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States?

7. Does Proposal C deny to intervenors and their respective represented class or classes the right to free exercise of religion and other enumerated rights guaranteed by the 1st Amendment to the Constitution of the United States as made applicable to the State of Michigan through the 14th Amendment to the Constitution of the United States?

I submit that the foregoing questions raised by the above entitled action are controlling questions of public law and are of such public moment as to require early determination. Accordingly, I urge that this Court, pursuant to rule 797 of the General Court Rules of 1963, exercise its discretion in authorizing and directing the Circuit Court for the County of Grand Traverse to certify to this Court the above stated questions, and such other questions as this Court may deem necessary and proper.

Respectfully submitted,

William G. Milliken

William G. Milliken, Governor

December 4, 1970
Date

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable

THOMAS E. KAVANAGH,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

The School District of
the City of Traverse City,
Plaintiff

vs 53144

The Attorney General, et al.,
Defendants,

and

St. Francis School, et al.,
Intervenor-Defendants

Upon due consideration of Intervenor-Defendants' "Motion for Preliminary Injunctive Order",

IT IS ORDERED that, pending final disposition of this cause, and until the further order of this Court, the Defendant Superintendent of Public Instruction shall be enjoined and restrained from disbursing any funds pursuant to the provisions of Chapter 2 of Act 100 of the Public Acts of 1970.

IT IS FURTHER ORDERED that pending final disposition of this cause, and until further order of this Court, the Plaintiff school board, and the Defendant State Board of Education shall be enjoined and restrained from discontinuing, suspending or otherwise interfering with:

1. shared time or dual enrollment programs

2. auxiliary services as defined in Sec. 622 of Act 269, PA 1955, being section 1 of Act 343, PA 1965, being section 340.622 CL 1948

3. the disbursement of federal moneys made available to the State of Michigan pursuant to Title I of the Elementary and Secondary Education Act of 1965 being 20 U.S.C. section 241a et. seq.

4. any payments now being made or hereafter ordered or required to be paid pursuant to or by reason of any order of any court having jurisdiction of any child or children.

5. any tax exemption, including those from real and personal property, income, sales, use, franchise, intangibles, inheritance, "in lieu of" or any other tax exemption allowed to intervenor-defendants or any of them.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
BODMAN P. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

The School District of the City of Traverse City,
Plaintiff

vs 53144

The Attorney General, et al.,
Defendants

and

St. Francis School, et al.,
Intervenor-Defendants

Upon due consideration of the importance of the issues raised herein, and the need for prompt resolution of the controlling questions of public law certified for submission herein;

IT IS ORDERED that oral argument in this case be scheduled for the opening of Court of Tuesday, January 5, 1971.

IT IS FURTHER ORDERED that 15 copies of typewritten briefs of all parties, and the briefs of amici curiae be submitted and filed not later than 12 o'clock noon on Wednesday, December 30, 1970.

IT IS FURTHER ORDERED that printed briefs be filed as soon thereafter as possible according to rule.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Kenneth W. Garman, et al.,
Plaintiffs

vs 53025

Secretary of State, et al.,
Defendants

Plaintiff's petition for hearing and consolidation with cause #53144 is considered and treated as a motion for reconsideration of this Court's order in Garman vs Secretary of State, Docket #53025, 384 Mich 751, and so considered,

IT IS ORDERED that the motion for reconsideration be and the same is hereby GRANTED. Upon such reconsideration the application of the Defendant in Garman vs Secretary of State, Docket #53025 for Leave to Appeal from the Decision of the Court of Appeals dated September 2, 1970 is GRANTED.

Plaintiff's petition for consolidation with cause #53144 is DENIED.

STATE OF MICHIGAN—ss

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Kenneth M. Garman, et al.,
Plaintiffs

vs 53827

Secretary of State, et al.,
Defendants

Upon due consideration of the relationship between this cause and Docket #51144,

IT IS ORDERED that oral argument in this cause be scheduled for the opening of Court on Tuesday, January 5, 1971.

IT IS FURTHER ORDERED that 15 copies of typewritten briefs of all parties, and the briefs of amici curiae be submitted and filed not later than 12 o'clock noon on Wednesday, December 30, 1970.

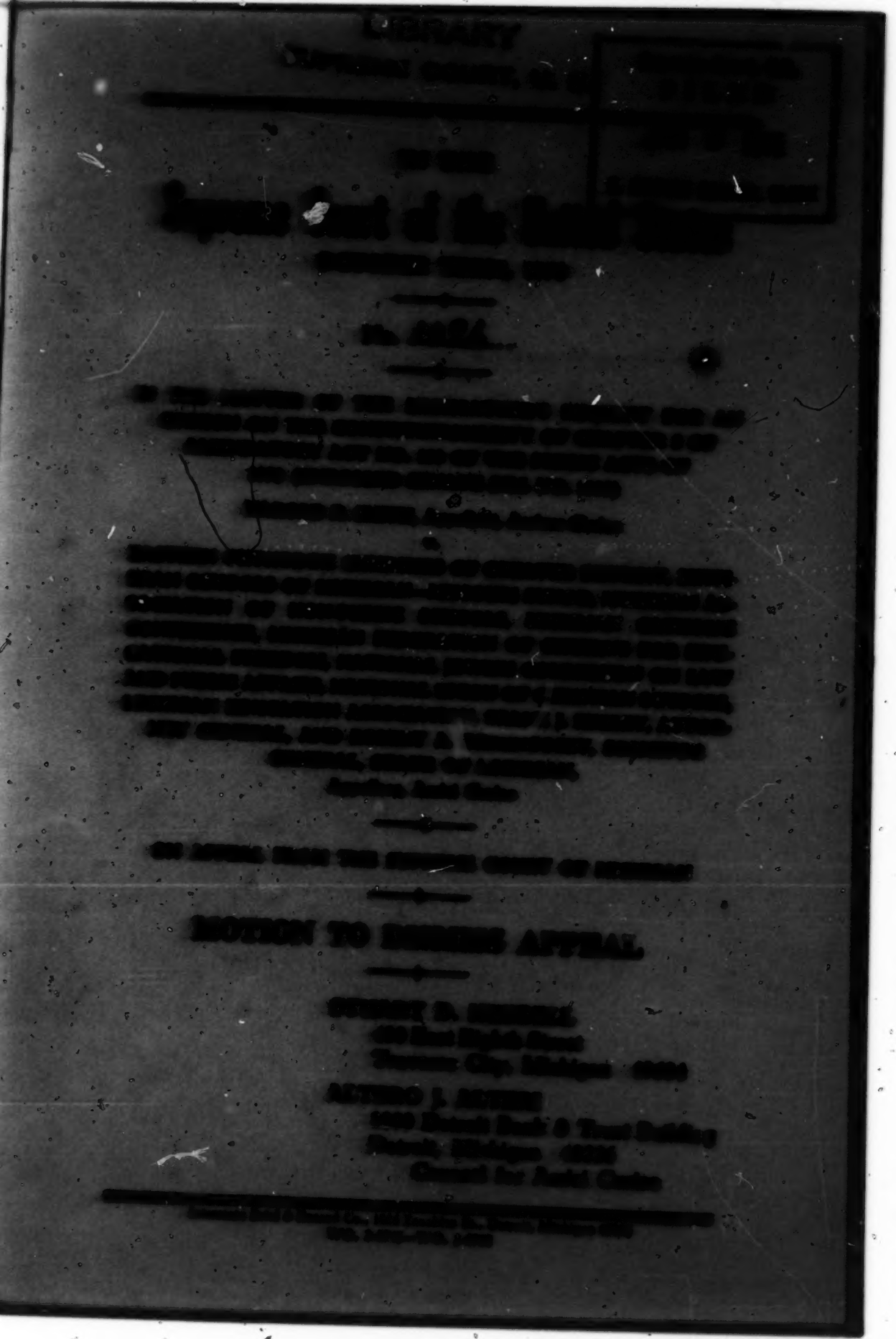
IT IS FURTHER ORDERED that printed briefs be filed as soon thereafter as possible according to rule.

STATE OF MICHIGAN—ss

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom; and the whole of said original now

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

IN THE MATTER OF THE LEGISLATURE'S REQUEST FOR AN OPINION ON THE CONSTITUTIONALITY OF CHAPTER 2 OF AMENDATORY ACT NO. 100 OF THE PUBLIC ACTS OF 1970 (ENROLLED SENATE BILL NO. 1082)

HAROLD R. SMITH, Appellant, Amicus Curiae

v.

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT, LUTHERAN SCHOOLS OF MICHIGAN—MISSOURI SYNOD, MICHIGAN ASSOCIATION OF NON-PUBLIC SCHOOLS, MICHIGAN CATHOLIC CONFERENCE, MICHIGAN FEDERATION OF CITIZENS FOR EDUCATIONAL FREEDOM, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, NATIONAL UNION OF CHRISTIAN SCHOOLS, MICHIGAN EDUCATION ASSOCIATION, FRANK J. KELLEY, ATTORNEY GENERAL, AND ROBERT A. DERENGOSKY, SOLICITOR GENERAL, STATE OF MICHIGAN,

Appellees, Amici Curiae

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS APPEAL

Appellees, Eastern Orthodox Churches of Greater Detroit, Lutheran Schools of Michigan—Missouri Synod, Michigan Association of Non-Public Schools, Michigan Catholic Conference, Michigan Federation of Citizens for Educational Freedom, National Jewish Commission on

Law and Public Affairs and National Union of Christian Schools, by their counsel, move the Court to dismiss the appeal herein on the following grounds:

I.

APPELLANT, HAROLD R. SMITH, FAILS TO SHOW THAT THE PRESENT PROCEEDING INVOLVES A CASE OR CONTROVERSY UNDER THE UNITED STATES CONSTITUTION, AND, THEREFORE, FAILS TO SHOW THAT THE COURT HAS JURISDICTION.

In Sections 66 and 66a of Act 100 of the Public Acts of 1970, Appellant's Jurisdictional Statement, Appendix B, page 33a, the Michigan Legislature requested from the Michigan Supreme Court a determination of the constitutionality of Chapter 2 of that act. This request for an advisory opinion was made pursuant to Mich. Const. Art. III, Sec. 8 which provides:

> Either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

It was pursuant to this Section of the Constitution that the above-captioned matter reached and was decided by the Michigan Supreme Court on September 14, 1970. See Appellant's Jurisdictional Statement, Appendix D, page 37a.

Notwithstanding the authority granted to the Michigan Supreme Court by the Michigan Constitution, it is quite clear that the Supreme Court of the United States has subject matter jurisdiction which extends only to "cases or controversies." U. S. Const. Art III, Section 1. It is equally obvious that the request for an advisory opinion, even relating to the constitutionality of a state statute,

will not be entertained by any federal constitutional court. *Local No. 8-6, Oil, Chemical and Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367-68 (1960); *Liverpool, N. Y. & P. S. S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885). Since this proceeding originatgd in a request by the Michigan legislature for an advisory opinion, it does not constitute the requisite "case or controversy" under the Federal Constitution.

Nor does it confer jurisdiction on this Court to assert that Harold R. Smith seeks a declaratory judgment from this Court relating to the validity of Act 100. The Declaratory Judgment Act, 28 U.S.C. Section 2201, relied on in Appellant's Jurisdictional Statement, requires a showing of an actual controversy within the Court's jurisdiction as a basis for justiciability. Absent such a showing, neither the Constitution nor the Declaratory Judgment Act has been satisfied, and the Court lacks jurisdiction. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

## II.

### APPELLANT FAILS TO SHOW ANY FACTS IN HIS JURISDICTIONAL STATEMENT INDICATING THAT HE HAS STANDING TO TAKE AN APPEAL FORM THE DECISION OF THE MICHIGAN SUPREME COURT.

Harold R. Smith, pursuant to leave of the Michigan Supreme Court, appeared and filed a Brief in this proceeding, not as a party, but as an *amicus curiae*. His status before the Michigan Supreme Court, therefore, was not that of an adversary or combatant, but rather that of a friend of the court. As such, under Michigan law, he was not a party to the proceeding and had no rights or liabilities therein except such as related to the filing of a Brief. He could not introduce testimony, he could not be heard orally

and he was not bound by any judgment of that Court. See *Grand Rapids v. Consumers Power Co.*, 216 Mich. 409, 415 (1921). Not being a party to the proceedings below, Harold R. Smith cannot show that the enforcement of the challenged order of the Michigan Supreme Court deprives him of a right arising under the constitution or laws of the United States. See *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 71, 88 (1928). Mr. Smith, therefore, lacks the standing appropriate and necessary to file this appeal.

Wherefore, the above named appellees pray that this Court enter an order dismissing the appeal.

Respectfully submitted,

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# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1970

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HAROLD R. SMITH,
*Appellant*,

vs.

No. 1096

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT, et al.,
*Appellees*.

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## ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

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## SUPPLEMENTAL BRIEF OF APPELLANT

The final Order of the Supreme Court of Michigan which is on appeal is not an "advisory opinion" as suggested by the language of the Legislature and the appellees. It is, in legal effect, a final judgment, and it is the legal effect of the Order that should control.

The statute, Act 100 P.A. 1970, provided annual appropriations from funds raised by taxation for the support of non-public, religious schools, the appropriation for the school year commencing July 1, 1970 not to exceed $22,000,000.00. The statute was to take effect September 1, 1970, but not until the "advisory opinion" of the Michigan Supreme Court.

The Order of the Michigan Supreme Court was entered on September 10, 1970. The Order was final; for the Supreme Court of Michigan is the highest court of the State

from which there is no appeal. No petition for rehearing was filed.

The tax funds were thus made available, retroactively, to July 1, 1970 by final Order. They would have been disbursed would it not have been for two events: (1) the adoption, on November 3, 1970, of a Michigan constitutional amendment, which is now before the Michigan Supreme Court; and (2) the appeal to this Court, which was docketed on December 14, 1970.

The statute appropriating the tax funds, although in the form of an opinion, is self-executing like any other judgment, no further action on the part of the executive, the Legislature or the courts is required for their disbursement.

The validity of the statute, Act 100 P.A. 1970, was drawn in question on the ground of its being repugnant to the Constitution of the United States, not in the Brief, but in the application of appellant for leave to file a Brief as *amicus curiae*. Jurisdictional Statement, Appendix C, paragraphs 7-10. Thus, the invitation of the Michigan Supreme Court to an interested party to file a Brief was accepted by appellant, and a Brief was filed. The only parties to the proceeding before the Michigan Supreme Court were those named as appellees in the Jurisdictional Statement. If none of those parties could appeal to the Supreme Court of the United States, the Legislature and the Supreme Court will have discovered (perhaps by accident) a method by which review by this Court of the final judgment of the highest court of a state on constitutional grounds may be evaded. This result certainly was not intended by the Michigan Supreme Court and should not be permitted by this Court in abdication of its position as the final interpreter and guardian of the Constitution of the United States.

The appellees question the "standing" of the appellant. Appellant requested permission to file a Brief as "a taxpayer and as a person interested in the determination." Permission was granted and the Brief, filed. The Brief is

criticized for brevity, not by the Court, but by the appellees. The only case cited was *DiCenso*, a three-judge decision which is now docketed in this Court on appeal. The opinion of the District Court of Rhode Island, which far surpassed the limited abilities of appellant, was quoted extensively by the dissenting judges in the opinion of the court below. It was the opinion of appellant that no further and extended Brief was necessary under the circumstances.

The "standing" of appellant in this Court is predicated upon the acceptance of his appearance below as a "taxpayer." *Flast v. Cohen*, 392 U.S. 83; 88 S.Ct. 1942. Appellant challenges the expenditures for non-public, religious schools as repugnant to the Establishment Clause of the First Amendment to the Constitution of the United States, page 103. He has "standing" consistent with Article III of the United States Constitution to invoke the federal judicial power, page 105.

Referring to the Establishment Clause, Mr. Justice Stewart said, in his concurring opinion, at page 114:

> "Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."

Referring to the same clause, Mr. Justice Fortas stated, at page 115:

> "Perhaps the vital interest of a citizen in the establishment clause, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this but certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented — the separation of church and state — which the Founding Fathers regarded as fundamental to our constitutional system — should be subjected to judicial testing. This is not a question

> which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided."

Appellant relies on his position as a taxpayer and also on his position as a member of the bar of this Court in his endeavor alone, and at his own expense, to defend one of the most important provisions of the Constitution of the United States and to preserve the barrier which our forefathers under the leadership of Madison and Jefferson erected to protect us from religious controversy.

The words "*amicus curiae*" as applied to appellant, are not fully descriptive of his position before this Court. They do not defeat his standing as a taxpayer or as a party interested in the determination of this appeal. And, certainly, the use of the words by the Court below should not be permitted to operate as a barrier to his appeal on a constitutional question to this Court. *Auto Workers v. Scofield*, 382 U.S. 205. This Court said, at page 207, of the *Scofield* decision:

> "A decision of the Seventh Circuit denied a motion to intervene, but authorized the union to file a brief as *Amicus curiae* without leave to participate in oral argument. The union sought review here, and we granted *certiorari* to review the denial of intervention because of the importance of the issue and the conflict among the courts of appeals. 379 U.S. 959. Further proceedings were stayed pending the completion of our review."

*Certiorari* was granted, and the cause was reversed and remanded.

After reading the Brief in Support of the Motion of the Attorney General to Dismiss or Affirm, there can be little doubt with respect to the importance of the issues and the urgency of a prompt review. At least it may be said that the Governor, the Legislature and the Supreme Court of Michigan considered the matter important. But the

urgency of the issue will not be satisfied by this Court dismissing the appeal and relegating the parties to future litigation over federal constitutional issues to the courts of Michigan and, perhaps, thereafter to future appeals to this Court.

After all, the last word on constitutional questions comes from the Supreme Court of the United States and not from the Supreme Court of any state.

Respectfully submitted,

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Dated: January 15, 1971.